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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JESSE ZUNIGA,

Defendant and Appellant.

B206557

(Los Angeles County
Super. Ct. No. KA080389)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed as modified with directions.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Zee Rodriguez and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jesse Zuniga appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 187, subd. (a), 664)¹ in counts 1 and 2; and carrying a loaded firearm (§ 12031, subd. (a)(1)) in count 3. The jury also found true the allegations as to counts 1 and 2 that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1) & (b)(4)) and that defendant personally used a firearm in the commission of the crimes (§ 12022.53, subds. (b), (c)). In a bifurcated proceeding, the trial court found true the allegation that defendant had suffered one prior conviction of a serious felony (§§ 667, subds. (a), (b)-(i), 1170.12).

Defendant was sentenced to 110 years to life in state prison. On counts 1 and count 2, defendant was ordered to serve two terms of 15 years to life, doubled to 30 years to life under the “Three Strikes” law, plus 20 years for the personal firearm use enhancement and five years for the prior serious felony conviction, for a total of 55 years on each count, the sentences to run consecutively.² On count 3, the trial court imposed the midterm of two years, doubled to four years under the Three Strikes law, to be served concurrently to the sentence on counts 1 and 2. Defendant was ordered to pay a \$200 restitution fine (§ 1202.4, subd. (b)) and a parole revocation fine (§ 1204.45) in the same

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² The abstract of judgment erroneously reflects that the term on count 2 was to be served concurrently to count 1. Since there is a discrepancy between the trial court’s oral pronouncement and the abstract of judgment, the oral pronouncement controls and the abstract of judgment must be corrected to reflect the oral pronouncement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *People v. Olmsted* (2000) 84 Cal.App.4th 270, 278-279.)

amount, but stayed pending successful completion of parole. He was also ordered to pay a \$20 court security fee (§ 1465.8, subd. (a)(1)).³

On appeal, defendant challenges (1) the trial court's decision not to bifurcate trial of the gang allegation, (2) the sufficiency of the evidence to sustain the convictions of attempted murder, and (3) the failure of trial counsel to object to comments about the special allegation and defendant's guilt. We reject defendant's claims of error.

However, we agree with the People that there is an error in the abstract of judgment, as indicated above. Additionally, the judgment must be modified to reflect the proper court security fee. We therefore modify the judgment and order the abstract of judgment corrected.

FACTS

On July 27, 2007, at approximately 1:20 a.m., Ramiro Haro (Haro) and Jose Martinez (Martinez) were walking to a smoke shop near Holt Avenue and Hamilton Boulevard in Pomona. While they were walking, Martinez saw a gray Mustang, driven by a girl, pass by several times. Two men, defendant and a younger man, approached Haro and Martinez. They asked Martinez where he was from. Martinez said from "nowhere."

Defendant checked to see if Haro or Martinez had tattoos. Haro had a tattoo that said "Pomona" on the back of his right wrist. Martinez had a tattoo on his forearm that

³ The minute order reflects two separate court security fees. The abstract of judgment indicates that the fee was imposed on counts 1 and 2. The reporter's transcript reflects only one fee imposed. The trial court should have imposed a court security fee of \$20 for each count. (§ 1465.8.) A court security fee attaches to "every conviction for a criminal offense." (*People v. Schoeb* (2005) 132 Cal.App.4th 861, 865.) Defendant should have had three \$20 fees imposed since he was convicted of three offenses. The judgment must be modified accordingly.

said “L.A. Dodgers.” Martinez explained that he liked baseball. Defendant asked Haro, “Why do you have Pomona . . . if you’re not a gangster?” Haro responded, “I like it.”

Defendant pulled out a gun from his waistband and said that he was looking for Cherryville gang members. Haro denied involvement in the gang. Defendant threatened to kill them if they were connected to Cherryville. Haro told defendant that if he had a gun, he should do something with it. Defendant said he was from Pomona 12th Street Gang. He then began firing. Haro heard approximately three shots before he was hit in the upper left chest and shoulder. He fell to the ground. He eventually got up and ran home. Defendant fired two or three more shots in his direction. Defendant also fired about seven to ten shots at Martinez as he was running away.

Pomona Police Officer Thomas De La Vega interviewed Haro at the hospital. Haro described one assailant as 5 feet 7 inches tall, approximately 145 pounds, wearing a dark T-shirt, dark pants, a blue baseball cap, and glasses. The other was approximately 5 feet 4 inches, 110 pounds, wearing a gray sweater and blue jeans.

Martinez told the police that he recognized the shooter, “Jesse,” because they had gone to Garey High School together. At trial, he said that defendant was wearing glasses and a hat on the day of the shooting. The glasses were similar to those defendant wore at trial. Approximately a month after the shooting, Martinez identified defendant’s photograph as that of the shooter. Defendant had attended Garey High School, and his sister drove a gray convertible Mustang.

On August 31, 2007, at approximately 10:30 p.m., Pomona Police Detectives Michael Lange and Greg Freeman were patrolling in an unmarked vehicle in the middle of 12th Street territory. They saw defendant in front of a house known to be a 12th Street hangout. The detectives illuminated him with a spotlight and defendant appeared startled. Defendant walked away quickly. The detectives stopped and got out of their car. Defendant started running and was told to stop. Detective Freeman saw defendant pull what appeared to be a gun from his right front pants pocket. Defendant lost his footing and fell. He was arrested and the gun was recovered.

When defendant was arrested, he was wearing a blue hat and eyeglasses. On the way to the police station, Detective Freeman realized that defendant fit the description of the shooter: his name was Jesse, he wore eyeglasses, went to Garey High School and was 18 years old.

While in custody, defendant telephoned his home and spoke with his sister, his brother, and his mother. The conversation was recorded and played for the jury. During the conversation, defendant indicated that he shot someone on Holt Avenue and he had used a different gun than the one recovered at his arrest. He also stated that the police didn't catch him with the gun on his person because he threw the gun away.

Detective Lange testified as a gang expert. He explained that gang members gain status and respect by committing crimes. He also explained that witnesses to or victims of gang crimes were often intimidated into not appearing in court or lying about the events.⁴

Detective Lange indicated that there were several gangs in Pomona, including 12th Street and Cherryville. He opined that the crimes were committed to benefit the 12th Street gang. He explained that the area of the shooting was in the "heart of Cherryville" territory. The shooting in the heart of Cherryville showed "the ultimate sign of disrespect." In the detective's training and experience, a gang member who was shooting at a believed rival would shoot to kill as it is considered "a badge of honor to shoot and take another soldier from a respective gang." If someone committed a crime in the name of 12th Street, but was not associated with the gang, that person would be subject to assault.

Detective Lange was not aware of any field identification cards from law enforcement identifying defendant as a 12th Street gang member, and defendant was not identified in Cal Gang. He noted that 12th Street gang members generally wore the color

⁴ Haro was in custody at trial because he had previously failed to appear in response to a subpoena and did not want to testify. Martinez was also in custody at trial for the same reason.

blue. Based upon his training and experience, Detective Lange opined that defendant was an active member of the 12th Street gang. This opinion was based on the investigation of the July 27 shooting, the August 31 arrest, defendant's possession of weapons, and the location where he was contacted by police. Additionally, defendant had admitted to the detective that he was associated with 12th Street.⁵

DISCUSSION

Denial of Motion to Bifurcate the Gang Allegation

Defendant contends that the trial court erred by not bifurcating the gang allegation. Defendant claims that the gang “evidence was highly prejudicial and inflammatory, and unnecessary to prove the underlying charges.” We disagree.

The prosecutor opposed bifurcation, arguing that the gang evidence was relevant to establish motive, intent, and identity. The trial court found as follows: “Under [section] 352 of the Evidence Code, the Court has the discretion to bifurcate issues where the prejudicial effect is outweighed by the probative value. Here the issue of gang motivation, if removed, would still be relevant to the issue of the individual's motive to kill, the intent to kill, and identity. [¶] The court finds the probative value outweighs the—any prejudicial effect. The jurors have indicated that the involvement of gang allegations are such that they would not harbor any bias toward them.”

In *People v. Hernandez* (2004) 33 Cal.4th 1040, the Supreme Court examined the question of bifurcation of gang enhancement allegations. It began by examining its holding on bifurcation of prior convictions allegations: because of the unique potential for prejudice if the jury learns of the defendant's prior convictions, the value of bifurcating trial of the allegations has been recognized by the Legislature and the courts. (*Id.* at pp. 1048-1049; cf. § 1025; *People v. Calderon* (1994) 9 Cal.4th 69, 74-77.) The

⁵ Defendant did not present any witnesses. Defense counsel argued there were discrepancies between Martinez's and Haro's account of the shooting.

court then observed that trial of gang enhancement allegations differs, in that “[a] prior conviction allegation relates to the defendant’s *status* and may have no prior connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation.” (*Hernandez, supra*, at p. 1048.)

Additionally, “the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a street gang enhancement. Nothing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given prior convictions.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)

The Supreme Court left it to the trial court’s discretion to determine whether to bifurcate trial of gang enhancement allegations. (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.) In doing so, it noted that the trial court’s discretion to deny bifurcation is broader than its discretion to admit gang evidence when no gang enhancement is alleged. (*Ibid.*) It also noted that the burden is on the defendant “to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.” (*Id.* at p. 1051.)

We find that the trial court properly exercised its discretion when it denied defendant’s bifurcation motion. Gang evidence was relevant to the issues of motive, intent and identity. Defendant asked Haro and Martinez where they were from, examined their tattoos and questioned them about them about gang membership. Defendant told them that he was associated with the 12th Street gang, he was looking for members of Cherryville and if he found out Haro and Martinez were “kicking with Cherryville or something,” he would kill them. Thus, the gang evidence that supported the gang enhancement was also admissible to prove the underlying charges.

Moreover, even if the trial court had erred in denying bifurcation of trial of the gang allegations, reversal would be required only if it was reasonably probable defendant

would have received a more favorable result had his request been granted. (Cf. *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1498.) This was not the case here.

First, as discussed below, there was substantial evidence of defendant's guilt, including the eyewitness identification by Martinez and defendant's recorded in custody admissions. Second, any prejudice may be lessened by a limiting instruction. (See *People v. Hernandez*, supra, 33 Cal.4th at pp. 1051-1052.) Such an instruction, CALCRIM No. 1403, was given here.⁶ The jurors are presumed to have understood and followed the instruction. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Sufficiency of the Evidence as to Counts of Willful, Deliberate and Premeditated Attempted Murder

Defendant contends his convictions on counts 1 and 2 must be reversed because the evidence was insufficient to sustain the premeditation and deliberation findings. We disagree.

In reviewing the sufficiency of the evidence, the question on appeal is whether there is evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People*

⁶ CALCRIM No. 1403 was given as follows:

“You may consider evidence of gang activity only for the limited purpose of deciding whether:

“The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related allegation charged;

“OR

“The defendant had a motive to commit the crimes charged;

“OR

“Whether the evidence tends to identify the defendant as the perpetrator of the crimes.

“You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion.

“You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime.”

v. Hill (1998) 17 Cal.4th 800, 848-849.) “In making this determination, we ““must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.””” (*People v. Rayford* (1994) 9 Cal.4th 1, 23; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) We also must examine the entire record, not merely ““isolated bits of evidence.””” (*Cuevas, supra*, at p. 261.)

Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Matters of credibility of witnesses and weight of the evidence are ““the exclusive province”” of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) A reviewing court cannot substitute its evaluation of a witness’s credibility for that of the trier of fact. (*Ibid.*)

Attempted murder requires the intent to kill plus a direct, but ineffectual, act towards its commission. (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Bland* (2002) 28 Cal.4th 313, 327-328.) The question of a defendant’s intent is a factual one. (*People v. Mincey* (1992) 2 Cal.4th 408, 433.)

The three categories of evidence to consider with respect to premeditation and deliberation are: “(1) prior planning activity; (2) motive; and (3) the manner of killing. ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.””” (*People v. Villegas* (2001) 92 Cal.App.4th 1217, 1223-1224.)

The evidence of planning includes the defendant arming himself with a loaded firearm before going into gang territory, looking for members of a rival gang. Planning is shown by defendant carrying a loaded firearm at the time of the incident. (*Id.* at p. 1224.) Martinez also saw the gray Mustang convertible driven by defendant’s sister pass by several times while he and Haro were confronted by defendant.

The evidence of motive established that the shooting took place in a rival gang’s territory. Defendant told the victims that he was from 12th Street, asked where they were from, indicating that he was looking for Cherryville members and if he found they were

“kicking” with Cherryville, he would kill them. Defendant also questioned the victims about their tattoos. The gang expert indicated that to commit a crime in a rival’s territory would elevate the status of the member and his gang.

The manner of shooting indicated that it was purposeful. Defendant fired two or three times at Haro, seven to ten times at Martinez, and then two or three more times at Haro as he ran away. (*People v. Villegas*, supra, 92 Cal.App.4th at pp. 1224-1225 [reviewing court considered that at least six shots were fired as evidence of premeditation and deliberation]). The fact that Haro was struck by a bullet lessens the contention that the act was random.

We find that there was substantial evidence to support the conviction of deliberate, premeditated attempted murder.

Comment Concerning Special Allegation and Defendant’s Guilt

Defendant contends that Detective Lange impermissibly commented about the special allegation and defendant’s guilt. Specifically, at the end of Detective Lange’s testimony, the prosecutor asked, “So you would expect somebody who was shooting to be shooting to kill?” Detective Lange responded, “Right. I mean, I think the basic instincts one shot you don’t intend or my experience get—you might be able to say I was only intending to injure. Ten shots I think you have a willful and deliberate act.”

Defendant’s counsel did not object to the response of Detective Lange and the People assert that the claim is forfeited. The People rely on Evidence Code section 353, which provides: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.” In accordance with Evidence Code section 353, appellate courts have

consistently held that a defendant's failure to make a timely objection renders a claim of error on that ground not cognizable on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.)

Defendant contends that if his claim of error is waived by counsel's failure to object, he was denied the effective assistance of counsel, in that there was no tactical reason for his counsel's failure to object to Detective Lange's comment. We disagree.

When a defendant raises a claim of ineffectiveness of counsel, he must establish that his "counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors and/or omissions, the trial would have resulted in a more favorable outcome." (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*In re Cudjo, supra*, at p. 687, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

While it is true that an expert may not give an opinion on whether the defendant is guilty, Detective Lange's response to the last question posed by the prosecutor, in context, may have referred to the facts in the hypothetical posed by the prosecutor. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.) The prosecutor's question was preceded by several general questions concerning how gang members conduct their crimes for the benefit of their gangs and how members commit their crimes and gain status for themselves within the gang. The prosecutor had asked the expert to assume certain facts for the purpose of the hypothetical questions asked. A fair reading of the response, in context, indicates that Detective Lange was not commenting on defendant's guilt or the truth of the special allegation. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.) To the extent Detective Lange's comment was a permissible response to a hypothetical question, defendant's trial counsel may not have objected because an

objection would have been futile. (See, e.g., *People v. Samayoa* (1997) 15 Cal.4th 795, 855.)

Even if the admission of the comment was erroneous, reversal is not required because it is not reasonably probable that defendant would have obtained a more favorable outcome if the trial court would have excluded the challenged answer of Detective Lange. The evidence against defendant was strong, including Martinez's identification of the shooter as "Jesse," a classmate at Garey High School, and the taped conversation played to the jury. During the conversation, defendant admitted he shot someone on Holt Avenue and had used a different gun than the one recovered at his arrest. Additionally, the trial court instructed the jury with CALCRIM Nos. 332 and 333, which stated that the jurors were neither bound nor required to accept an opinion and that they should give each opinion the weight that they felt it deserved. Accordingly, defendant has failed to prove the prejudice necessary to establish ineffective assistance of counsel. (*In re Cudjo, supra*, 20 Cal.4th at p. 687; *People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218.)

DISPOSITION

The judgment is modified to reflect a court security fee of \$20 imposed for each count, for a total of \$60. As so modified, the judgment is affirmed. The clerk of the court is directed to prepare a corrected abstract of judgment reflecting the imposition of \$60 in court security fees and the imposition of consecutive sentences on counts 1 and 2, and to forward a copy of the corrected abstract of judgment to the Department of Corrections.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.